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92-13

COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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Summary

In 1980 the Commission found that its public interest mandate to ensure a "rapid, efficient nationwide and worldwide" network "with adequate facilities at reasonable charges" would best be realized through a competitive market in domestic public switched services. Two years later, the agency further determined that such a competitive marketplace could best develop if the regulatory barriers to market entry were eased for carriers lacking market power. These "non-dominant" carriers were relieved of Section 203 tariffing and Section 214 authorization requirements, but remained subject to the obligation to operate with just, reasonable and non-discriminatory rates and practices.

Experience during the 10 years since the adoption of this "forbearance" policy shows it to be well on the way toward achieving the goals of the Communications Act. Service quality has been enhanced immeasurably with the construction of at least four competing national fiber optic networks; total public usage of telecommunications services has more than doubled; and average prices for interstate services have been halved. Although AT&T still occupies a dominant position in the marketplace, the FCC's move toward competition has produced many public benefits.

It is now being argued, however, that the Communications Act may not be flexible enough to accommodate these policies. In particular, contentions are advanced questioning the Commission's ability to forbear from applying the tariff and facilities authorization portions of the Act to non-dominant carriers. The Supreme Court's disapproval of an Interstate Commerce Commission deregulatory initiative, contained in *Maislin Industries, U.S. v. Primary Steel, Inc.*, is said to call the FCC forbearance policy into question. This concern is unfounded.

First, at the time the Commission adopted its forbearance scheme, it conducted a thorough review of the Communications Act implications. It found that Sections 151 and 154(i) of the Act, and related court rulings examining the scope and flexibility of the agency's powers, grant the Commission broad discretion in fulfilling its public interest mandate. This careful FCC interpretation of its own enabling statute is entitled to substantial deference on judicial review.

Second, the Congress has essentially approved of the Commission's forbearance scheme of regulation. In 1990, in adopting operator services legislation, Congress was careful not to disturb the agency's forbearance policy. Moreover, on several occasions between 1982 and today the Congress has acknowledged the existence of the forbearance policy without objection. Under Supreme Court precedent, this tacit Congressional endorsement of the FCC's interpretation of the Act further strengthens the deference to which the Commission's reading is entitled.

Third, the Supreme Court's *Maislin* ruling was based on entirely different circumstances from the FCC's forbearance analysis. In that case, the ICC had essentially deregulated all motor carriers; the agency thus had lost all ability to judge its regulatees or to ascertain whether their rates were just, reasonable or non-discriminatory. On that basis, the Court found that the ICC had exceeded its authority by abdicating its statutory responsibilities.

In contrast, the FCC continues to apply tariff regulation requirements to the dominant carrier, which occupies nearly two-thirds of the marketplace. It is only the remaining non-dominant competitors — who lack market power and thus are incapable of setting prices or adopting practices except as dictated by competition with the regulated dominant provider — who are excused from tariff and facilities authorization obligations. And, even then, the commission has

repeatedly emphasized that those carriers remain subject to rate and service regulatory constraints of Sections 201 and 202 of the Act, and that complaints under Section 208 will be welcomed if they attempt to defy these statutory provisions. Thus, by leaving the dominant provider subject to its tariff scheme, the FCC has retained, even enhanced, its ability to ensure that all carriers under its authority operate on just, reasonable and non-discriminatory terms.

It is clear that the *Maislin* decision does not require a rote literal reading of the Communications Act. Instead, it imposes only an obligation for the FCC to continue to fulfill its Congressional mandate; so long as it does so, the agency has broad discretion in organizing its specific regulatory regime, as the courts have affirmed frequently.

If the Commission should determine that non-dominant carriers should file tariffs, despite the lawfulness of forbearance, such tariff filings should permit the maximum flexibility. CompTel specifically, urges the Commission to further streamline its regulatory requirements to include: 1) shortened notice periods, a presumption of lawfulness and relaxed costs-support requirements for tariff filings; 2) reduced filing fees for non-dominant carriers; and 3) the application of rate "ranges" for non-dominant IXCs. Regulatory barriers to market entry should not be increased in a manner which will reduce the effectiveness of the FCC's pro-competitive policies.

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FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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COMMENTS OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, hereby submits its comments in the above-captioned proceeding. As demonstrated below, the Commission's 10-year-old tariff forbearance policy for non-dominant common carriers is well within the agency's lawful discretion under the Communications Act and should be maintained. Nonetheless, should the Commission decide not to continue its forbearance policies, it should consider further streamlining its tariff filing rules for non-dominant interexchange carriers.

I. INTRODUCTION

A. Statement of Interest

CompTel is the principal nationwide industry association representing non-dominant interstate common carriers and their suppliers and related enterprises. These companies range in size from over $500 million in annual revenues to less than $1 million. The majority of CompTel's members compete directly with AT&T in the provision of residential and business telecommunications services. While some of these companies are facilities-based

carriers, most are primarily resellers, usually purchasing transmission capacity from the carriers with which they compete.

CompTel's members are all subject to "non-dominant" classification and forbearance regulation under the Commission's rules. They have been able to enter the market and compete, in part, because the Commission has reduced the regulatory barriers to market entry and the administrative burdens of tariff filing and justification. In other words, the Commission has brought to the public the benefits of emerging competition by exerting its regulatory authority in adopting and maintaining the forbearance scheme.

As interstate, non-dominant, interexchange carriers ("IXCs"), CompTel members thus are directly affected by this rulemaking, both in the type of regulatory treatment they receive, and in the regulatory approach used to oversee their dominant competitor — AT&T.

B. Background

1. The Evolution of Forbearance Regulation

In 1980, the Commission completed a proceeding designed to determine the "optimal industry structure for the MTS-WATS market including an entry policy and other related regulatory policies which in combination will be most likely to produce results that further the goals of the Communications Act."[1] The Commission quickly concluded that all public switched services should be open to competition.

Upon opening the MTS/WATS marketplace, the Commission also recognized that new entrants with negligible market share should not be subject to the same degree of economic regulation as applied to the dominant carrier —

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1 *MTS and WATS Market Structure*, 81 F.C.C.2d 177 (1980).

AT&T. Accordingly, the Commission initiated its *Competitive Carrier Rulemaking*[2] to "adjust the agency's rate filing and facilities review procedures in light of the advent of the entirely new kinds of firms now offering communications services."[3]

In its *First Report and Order*, the Commission established two classes of common carriers: "dominant" carriers were defined as those having "market power" (i.e., power to control price),[4] while "non-dominant" carriers were those carriers without market power. For dominant carriers — primarily AT&T and the local exchange carriers — the Commission's full Section 203 and 214 regulations would remain in effect. Non-dominant carriers would be subject to "streamlined" versions of those regulations[5] on the ground that they lacked both the ability and incentive to engage in anticompetitive conduct or pricing.[6]

The following year, the Commission released its *Second Report and Order*. It noted that while the *First Report* "took a significant first step toward reducing or removing unnecessary regulatory burdens on non-dominant carriers . . . an even more dynamic and far-reaching approach was necessary to foster innovation

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2 *See Policy and Rules Concerning Rates for Competitive Common Carrier Services*, 77 F.C.C.2d 308 (1979) (Notice of Inquiry and Proposed Rulemaking) [hereinafter *NPRM*]; 85 F.C.C.2d 1 (1980) (First Report and Order) [hereinafter *First Report and Order*]; 84 F.C.C.2d 445 (1981) (Further Notice of Proposed Rulemaking); 91 F.C.C.2d 59 (1982) (Second Report and Order) [hereinafter *Second Report and Order*], *recon. denied*, 93 F.C.C.2d 54 (1983); 47 Fed. Reg. 17,308 (1982) (Further Notice of Proposed Rulemaking); 48 Fed. Reg. 28,292 (1983) (Third Further Notice of Proposed Rulemaking); 48 Fed. Reg. 46,791 (1983) (Third Report and Order); 95 F.C.C.2d 554 (1983) (Fourth Report and Order) [hereinafter *Fourth Report and Order*]; 96 FCC 2d 922 (1984) (Fourth Further Notice of Proposed Rulemaking); 98 F.C.C.2d 1191 (1984) (Fifth Report and Order); 99 F.C.C.2d 1020 (Sixth Report and Order) [hereinafter *Sixth Report and Order*], *rev'd*, *MCI Telecommunications Corp. v. FCC*, 765 F.2d 1186 (D.C. Cir. 1985).

3 *First Report and Order* at 2 (footnote omitted).

4 *First Report and Order* at 10.

5 Specifically, the Commission provided that tariff filings would 1) be presumed lawful, 2) be effective on 14 days notice and 3) not have to be supported by cost justification data. In addition, non-dominant carriers would be relieved from filing Section 214 applications and could discontinue service 30 days after notice to the customer.

6 *First Report and Order* at 20-21.

and the efficient development of the telecommunications industry."[7] Thus, the Commission ruled that it would "forbear" from applying "particular Title II regulations in instances where such forbearance furthers statutory purposes and the public interest".[8] Specifically, forbearance eliminated only the need to adhere to the entry and exit requirements of Section 214 and the tariff filing requirements contained in Section 203. The Commission found that these regulatory policies served "no public policy that will not be better served by competitive market forces."[9] The agency relied on the Section 208 complaint process to "remedy any irrational carrier conduct or aberrations that might occur."[10]

The Commission based this forbearance policy on the finding that non-dominant IXCs are simply not able to charge excessive rates or engage in undue discrimination in contravention of the Communications Act without losing their customers. Thus, these carriers cannot "rationally charge rates or engage in practices which contravene the requirements of the Act."[11] In short, competitive IXCs —while subject to a "lesser" form of regulation than their dominant counterpart — remain indirectly subject to rate regulation through their competition with AT&T, the regulated dominant carrier. The overwhelming presence of this dominant carrier precludes unreasonable or unfair practices by AT&T's competitors.[12]

The Commission made clear that the forbearance scheme of regulation is not the functional equivalent of deregulation. Non-dominant carriers have by no means been relieved of the Title II requirements for providing service upon

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7 *Second Report and Order* at 60.
8 *Id.* at 62.
9 *Second Report and Order* at 72-73.
10 *Id.* at 70.
11 *Second Report and Order* at 69.
12 *First Report and Order* at 31.

reasonable request, at reasonable prices, and without undue discrimination. As the *First Report* recognized, the policy "merely modifies the method by which the Commission assures compliance with these requirements."[13]

Over the years, the Commission has had several opportunities to review its forbearance policies and has gradually expanded the list of carriers eligible for forbearance and modified the extent of the forbearance regulation.[14] In this way, the agency has carefully and systematically evaluated the effects of its policy at each step.[15]

2. The Evolution of Competition Under Forbearance

The Commission's *Competitive Carrier* initiative was based, in large part, on the peculiar circumstances of the interexchange market. The Commission concluded that removal of barriers to entry and elimination of burdens on new participants were the best ways to ensure realization of the eventual public benefits of competition, including better service, lower rates and greater innovation and infrastructure investment.[16] In the ten years that the forbearance policy has been in place, the Commission's plan has been a marked success. Services and consumer choices have improved drastically, prices have decreased more than 40 percent in absolute terms, and investment in infrastructure has produced four national fiber optic networks. When examining

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13 *Id.* at 18.

14 The Commission chose resellers of terrestrial services as the first class of carriers to benefit from its new regulatory policies. The following year the Commission extended its forbearance policies to specialized common carriers and all remaining resellers. In its *Fourth Report and Order*, all remaining domestic non-dominant carriers were included in the new regulatory regime.

15 The Commission has also recently taken several actions to reduce significantly the regulation applicable to AT&T. *Policy and Rules Concerning Rates for Dominant Carriers*, 4 FCC Rcd 2873, 2877, 2943 (1989) [hereinafter *Price Caps*], *recon.*, 6 FCC Rcd 665 (1991). In these orders the Commission consistently sought to ensure that AT&T could not use its remaining market power to disadvantage its non-dominant competitors unfairly.

16 *First Report and Order* at 14.

the effects of the Commission's policies over the past decade, certain facts are striking:

- total interstate minutes rose from 154 billion in 1982 to 345 billion in 1990;
- AT&T's market share declined from 98.7 percent in 1984 to 63.5 percent in 1990;
- the number of interstate carriers offering service went from 11 in 1982 to well over 100 today; and
- AT&T's charge for a 10 minute call from Los Angeles to Washington, D.C. dropped from $5.15 to $2.49.

During this same period, complaints or other evidence of unjust, unreasonable or unduly discriminatory charges by non-dominant "1+" carriers were virtually non-existent. Clearly, the experience of the past decade demonstrates the correctness of the Commission's determination that its forbearance policy best enables the assurance of a "rapid, efficient Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges."[17] By lowering barriers to entry for smaller market participants, the Commission has engendered competition and futhered its public interest purposes.

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17 47 U.S.C. § 151 (1988). Today, AT&T retains residual advantages in the interexchange marketplace that enable it to remain the dominant carrier. These circumstances have been well-documented in other proceedings. *See, e.g., Price Caps* at 2943; *Competition in the Interstate Interexchange Marketplace*, 6 FCC Rcd 5880 (1991). Thus, while the Commission's forbearance policy has helped provide the public with higher quality service and more choices at lower prices than ever before, the market still lacks the essential characteristics of true competition. The forbearance policy, however, may still show itself capable of accomplishing this ultimate goal if permitted to continue in its present state until competition is fully realized.

II. TARIFF FORBEARANCE FOR NON-DOMINANT CARRIERS IS WITHIN THE COMMISSION'S AUTHORITY UNDER THE COMMUNICATIONS ACT

A. The Commission's Competitive Carrier Analysis Remains Correct As A Matter of Law

During the *Competitive Carrier Proceedings*, the Commission was careful to examine the legal implications associated with loosening regulatory burdens on various classifications of common carriers. As both the Commission and courts have recognized, the Act gives the Commission broad discretion in choosing how to regulate in order to effectuate its public interest mandate, and "the administrative process possess[es] sufficient flexibility to adjust itself to these factors."[18]

Focusing on Section 151,[19] the Commission has ruled that continued regulation of some carriers which imposed substantial costs on the public, and was not exceeded by the benefits obtained therefrom, was contrary to the Commission's ultimate public interest mandate.[20] The Commission found further support for its actions in Section 154(i) of the Act,[21] stating that the subsection enhances the FCC's general "legislative discretion" in ratemaking. This legislative power has been recognized by the Supreme Court as existing in other similar agency authorizing statutes, and has been used to uphold agency actions and programs that are outside the authorized body's organic statute.[22] Further, the Commission reviewed other decisions in which it found that "competition in the telecommunications industry is a relevant factor in weighing

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18 *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 138 (1940). *See also United States v. Southwestern Cable Co.*, 392 U.S. 157, 172-73, 180-81 (1968); and *National Broadcasting Co. v. United States*, 319 U.S. 190, 218-19 (1943).

19 47 U.S.C. § 151 (1988).

20 *First Report and Order* at 13.

21 47 U.S.C. at § 154(i) (1988).

22 *See Southwestern Cable Co.* 392 U.S. at 180-81. *See also FPC v. Texaco Inc.*, 417 U.S. 380, 387 (1974).

the public interest."[23] In short, the Commission based its actions on its general powers to organize its own processes and to act to further its public interest goals.

Since the forbearance policy was instituted in 1982, the courts have had occasion to review various aspects of the Commission's forbearance policy as well. For example, in *MCI Telecommunications Corp. v. FCC*,[24] the D.C. Circuit set aside only one very limited aspect of the FCC's forbearance policy — the Commission's refusal to permit non-dominant carriers to file tariffs voluntarily. Indeed, the Court recognized that "the Commission could further streamline the regulation of non-dominant carriers without encountering any contrary congressional prescription."[25]

The 10 years of regulatory experience since the forbearance policy was initiated also provides important support for the correctness the Commission's public interest analysis. Whatever literalist readings of the Communications Act which critics of forbearance might have offered in 1982, or still today, the policy's success belies such contentions. The agency's conclusions that forbearance for non-dominant carriers would further public policy goals without resulting in increased instances of unjust charges or unfair discrimination have been borne out. Certainly the Communications Act is not so rigid as to require the agency to ignore ten years of practical experience and rely purely on academic readings of the Communications Act to determine whether forbearance is within its

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23 *First Report and Order* at 13 (citing *FCC v. RCA Communications, Inc.*, 346 U.S. 86 (1953); *Specialized Common Carrier Servs.*, 29 F.C.C.2d 870 (1971), *recon.* 31 F.C.C.2d 1106 (1971), *aff'd sub nom. Washington Utils. and Trans. Comm'n v. FCC*, 512 F.2d 1142 (9th Cir.), *cert. denied*, 423 U.S. 836 (1975); *Bell Tel. Co. of Pa. v. FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 411 U.S. 1026 (1975); *NARUC v. FCC*, 525 F.2d 630, 640 (D.C.Cir. 1976), *cert. denied*, 425 U.S. 992 (1977); *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980)).

24 765 F.2d 1186 (D.C. Cir. 1985).

25 *Id.* at 1196.

mandate.[26] In fact, these real world considerations are the very reason that courts give deference to expert agencies in the interpretation of their own enabling statutes,[27] including the Communications Act.[28]

B. Congress Has Reviewed and Ratified Forbearance As An Appropriate Form of Title II Regulation of Common Carriers

Congress has been acutely aware of the Commission's forbearance policy from its inception. In numerous hearings — as recently as 1990 — Congress has received substantial information about the FCC's forbearance policies. Throughout this period, the Congress has expressed regular and unquestioning support for the FCC's actions, and has never even considered the Commission's forbearance policy to be at odds with the requirements of the Communications Act.

1. TOCSIA Sought to Preserve Forbearance

The best example of Congressional acceptance of the FCC's forbearance from regulation came in 1990, when Congress enacted the Telephone Operator Consumer Services Improvement Act[29] ("TOCSIA"). This new law provides a framework for regulation of common carriers offering operator assisted long distance calling. During the course of hearings on the legislation — which took place before three separate Congressional subcommittees[30] — Congress carefully

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26 *Cf., American Airlines, Inc. v. CAB*, 359 F.2d. 624 (D.C. Cir.), *cert. denied*, 385 U.S. 843 (1966).

27 *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380 (1984).

28 *See FCC v. WOKO, Inc.*, 329 U.S. 223, 229 (1946); *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 810 (1978); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981).

29 47 U.S.C.A. § 226 (West. Supp. 1990)

30 *The Federal Communications Commission's Regulation of Alternative Operator Services: Hearing Before the Subcomm. on Government Information, Justice and Agriculture of the House Comm. on Government Operations*, 101st Cong., 1st Sess.

considered the proper level of regulation for common carriers operating in this newly competitive portion of the interexchange marketplace.[31] At the conclusion of these deliberations, the Congress enacted a statutory approach to the regulation of operator services expressly intended to allow the Commission to continue its forbearance policy.

There is no doubt that Congress considered operator service providers ("OSPs") to be common carriers subject to Title II of the Act.[32] Indeed, the record is replete with references to OSPs' duties to provide service at just and reasonable rates.[33] During the hearings, Congress was urged not to reverse the forbearance policy and force OSPs to submit formal tariffs under Section 203 on the grounds that this would disrupt the FCC's *Competitive Carrier* policies and impose burdensome regulatory requirements on fledgling competitors.[34] Instead, it was argued that forbearance regulation should continue to apply equally to OSPs.

Congress responded by enacting legislation which expressly preserved the Commission's forbearance policy. In TOCSIA, the Congress directed the FCC to

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(1989); *Telephone Operator Services: Hearing on H.R. 971 Before the Subcomm. on Telecommunications and Finance of the House Comm. on Energy and Commerce*, 101st Cong., 1st Sess. (1989) [hereinafter *House Operator Services Hearing*]; *Telephone Operator Consumer Services Improvement Act of 1989: Hearing on S. 1643 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation*, 101st Cong., 2nd. Sess. (1990) [hereinafter *Senate Operator Services Hearing*]

31 Indeed, FCC Common Carrier Bureau Chief Gerald Brock informed the House Telecommunications and Finance Subcommittee that if AOS companies were to be reclassified, "it would change our entire competitive carrier structure, our distinction between dominant and non-dominant companies." *House Operator Services Hearing* at 58.

32 Chairman Markey of the House Telecommunications and Finance Subcommittee even recognized the dominant/non-dominant dichotomy in the operator services market by referring to AT&T as the traditional *dominant* carrier in the operator services market. *House Operator Services Hearing* at 1.

33 *See Id.* at 28, 47; *Senate Operator Services Hearing* at 47, 65. *See also* H.R. Rep. No. 101-213, 101st Cong., 1st Sess. 5 (1989).

34 *See House Operator Services Hearing* at 172.

adopt certain procedures, such as "informational" tariffs,[35] which would allow OSPs to remain non-dominant, and therefore, exempt from the more burdensome regulatory requirements. In addition, Congress informed the Commission that it may discontinue the informational tariff filing requirement after four years if the Commission finds that it is no longer necessary.[36]

2. Congressional Knowledge and Support Has Been Consistent

Beyond TOCSIA, there have been many telecommunications-related Congressional initiatives — and several major and minor revisions and additions to the Communications Act[37] —during the past 10 years. Never, however, has there been any consideration given to a reversal of the forbearance policy. To the contrary, in 1981 Congress considered legislation which would have directed the FCC to adopt a regulatory framework very similar to the one devised in the *Competitive Carrier* docket.[38] The legislation proposed to amend the Communications Act to provide for the classification of common carriers as dominant, regulated or deregulated carriers. In considering this legislation, the Congress held 12 days of hearings on the subject of competition and regulation in the interexchange telecommunications marketplace. The legislation was not completed, and in 1982, the Commission adopted the *Competitive Carrier* scheme on its own.[39]

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35 As recognized by the Commission, the "informational tariff filing requirements are more lenient than the tariffing requirements of section 203 of the Act." *Tariff Filing Requirements for Interstate Common Carriers*, FCC No. 92-35, at 3 (Jan. 28, 1992).

36 *See* 47 U.S.C.A. § 226 (1991).

37 *See* Pub. L. No. 101-396, § 7(b), 1990 U.S.C.C.A.N. (104 STAT.) 848, 850; Pub. L. No. 101-239 §§ 3001-02, 103 STAT. 2111, 2124-32 (1989); Pub. L. No. 100-594, 102 STAT. 3021 (1988); Pub. L. No. 94-376, 90 STAT. 1080 (1976).

38 *See* H.R. 5158, 97th Cong., 2d Sess. (1981) (Telecommunications Act of 1982).

39 Indeed, when Congress held its hearings, the Commission had already issued its NPRM in the *Competitive Carrier* docket but had not enacted forbearance

A competitively-driven telecommunications marketplace has been a consistent Congressional goal ever since. In hearings held in 1986, former House Telecommunications and Finance Subcommittee Chairman Timothy E. Wirth (D-CO) declared that the Subcommittee's intent was to ensure that the telecommunications marketplace was governed "through the forces of competition rather than through the forces of monopoly or regulation."[40] Also, in amending Section 332 of the Communications Act, Congress explicitly stated that nothing in the amended section "should be construed as prohibiting the Commission from forbearing from regulating common carrier land mobile services.[41] Thus, Congress has sought to ensure the continued development of competition through protection of the FCC's forbearance policies.

Furthermore, various FCC Commissioners have often testified before Congress describing forbearance and other dominant/non-dominant carrier policies. For example, in 1988, former FCC Chairman Dennis R. Patrick stated before the House Subcommittee on Telecommunications and Finance that a "substantial policy agreement . . . exists between the Commission and the Members of this Subcommittee concerning the regulation of dominant carriers in general."[42] More recently, current FCC Chairman Alfred C. Sikes appeared before the same Congressional subcommittee discussing the FCC's common

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policies. *And* while the legislation was not enacted, it sent a clear signal to the FCC that Congress believed that forbearance regulation was necessary. Against this backdrop, it is not surprising that only one year later the Commission adopted forbearance regulation on its own.

40 *Transition In The Long Distance Telephone Industry: Hearings before the Subcomm. on Telecommunications, Consumer Protection, and Finance of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 581 (1986). *See also* statements by Energy and Commerce Chairman John Dingell and former FCC Chairman Mark Fowler discussing the filing requirements for competitive carriers. *Id.* at 612.

41 H.R. Conf. Rpt. No. 765, 97th Cong., 2nd Sess. 56 (1982).

42 Statement of Dennis R. Patrick, Chairman, Federal Communications Commission Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, United States House of Representatives, at 1 (July 13, 1988).

carrier programs.[43] Obviously, the Congress has had abundant knowledge of the Commission's forbearance policy from its inception and has never expressed anything but approval.

3. Judicial Significance of Congressional Approval

The United States Supreme Court, in a long line of decisions, has accorded particular deference to the administrative construction of statutes when Congress has considered that interpretation and chose to leave it intact.[44] The Court has found this type of tacit Congressional endorsement to be especially significant when viewed against the backdrop of a persistent course of executive conduct[45] or a longstanding judicial construction of a statute.[46]

The Supreme Court has regularly relied upon the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong, especially when

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43 Statement of Alfred C. Sikes, Chairman, Federal Communications Commission Before the Subcommittee on Telecommunications and Finance of the Committee on Energy and Commerce, United States House of Representatives (June 19, 1991).

44 *See eg. United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 133-35 (1985); *Heckler v. Day*, 467 U.S. 104, 111-13 (1984); *Bob Jones University v. United States*, 461 U.S. 574, 599-601 (1983); *Guardians Ass'n v. Civil Serv. Comm'n of New York*, 463 U.S. 582, 592-93 (1983); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 532-35 (1982); *Haig v. Agee*, 453 U.S. 280, 299 (1981); *United States v. Rutherford*, 442 U.S. 544, 554 & n.10 (1979); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965).

45 *See Dames & Moore v. Regan*, 453 U.S. 654, 678-87 (1981).

46 *See Flood v. Kuhn*, 407 U.S. 258, 273-84 (1972). The Supreme Court has, on occasion, expressed a wariness about its using congressional inaction as a guide to legislative intent. *See eg. Bob Jones University*, 461 U.S. at 600 ("Ordinarily . . . courts are slow to attribute significance to the failure of Congress to act on particular legislation."). But in cases in which the Court has dismissed the significance of such inaction as a basis for its decision, it has done so only after concluding that, in that particular case, Congress had inadequately addressed the issue at hand. *See eg. SEC v. Sloan*, 436 U.S. 103, 120-21 (1978) ("[T]he attention of the Committee and of the Congress was focused on issues not directly related to the one presently before the Court."); *Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980) ("[S]ince the legislative consideration of those statutes was addressed principally to matters other than that at issue here . . . "). As the above discussed, the Congress was thoroughly aware of the FCC's forbearance policy.

Congress has refused to alter the administrative construction."[47] Thus, under Court precedent the Congress' failure even to consider any legislation that would overturn the Commission's longstanding forbearance policies can properly be interpreted as a sign of Congressional acceptance of the agency's policies.[48]

C. The Supreme Court Ruling in Maislin Does Not Change the Communications Act Analysis

The only development since 1982 that can even arguably be said to raise questions about the Commission's forbearance policy is the recent Supreme Court ruling in *Maislin Industries, U.S. v. Primary Steel, Inc.*[49] Despite the Commission's original legal analysis of the Communications Act, the accuracy of that analysis demonstrated by the experience of the past 10 years, and the Congressional support for the Commission's interpretation of the Act, AT&T has suggested in a complaint against MCI[50] that this Supreme Court ruling requires abandonment of forbearance. In fact, the regulatory scheme considered in *Maislin* differs so fundamentally from that of the FCC that the Court's decision there has little relevance to the Communications Act and FCC regulation of the communications industry. Ironically, the true teaching of *Maislin* is that the

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47 *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) (footnotes omitted).

48 In contrast, in the *Maislin* case, (discussed *infra*) the Interstate Commerce Commission based its decision, in part, on passage of the Motor Carrier Act of 1980, which significantly deregulated the motor carrier industry. The ICC reasoned that the deregulatory steps taken by Congress created a competitive atmosphere in which strict application of the tariff requirements were unnecessary to deter discrimination. The Supreme Court, however, rejected this interpretation. The Court noted that the Congress was well aware of the existence of the ICC's earlier forbearance policy with respect to motor contract carriers and had deliberately chosen not to extend it to common carriers when enacting the 1980 Act. Circumstances in the telecommunications field are obviously much different, as evidenced by the above discussion of the enactment of TOCSIA.

49 110 S.Ct. 2759 (1990).

50 *AT&T Communications v. MCI Telecommunications Corp.*, 7 FCC Rcd 807 (1992).

FCC *must* regulate AT&T but may continue to apply forbearance to non-dominant carriers.

In *Maislin*, a bankruptcy trustee for a motor common carrier sued a shipper for a balance due resulting from purported "undercharges" by the carrier. The motor carrier, pursuant to ICC authority,[51] had privately negotiated a lower rate with the customer than the one contained in the carrier's published tariff. The Court, while upholding other aspects of the ICC's streamlining policies, ruled that the "filed rate" doctrine is central to the ICC's regulatory scheme and "forbids as discriminatory the secret negotiation and collection of charges lower than the filed rate."[52] Central to the Court's conclusion was the view that, without adherence to tariffed rates, the ICC would be unable to fulfill its statutory duties to ensure just, reasonable and non-discriminatory rates and practices. The Court felt that the ICC policy at issue prevented the agency from doing its job properly.

At least two key differences between the facts of the *Maislin* case and the FCC's forbearance policy are obvious. First, the Court did not consider the issue of forbearance *per se*. Rather, it found that the particular scheme adopted by the ICC did not permit the agency to perform its role effectively.[53] Second, the ICC doctrine applied to *all* carriers; there was no regulated dominant carrier. These distinctions are critical to any attempt to analyze the FCC's forbearance policy against the *Maislin* ruling.

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51 See Petition to Institute Rulemaking on Negotiated Motor Common Carrier Rates, 5 I.C.C.2d 623 (1989).

52 Maislin, 110 S.Ct. at 2768.

53 See Maislin, 110 S.Ct. at 2770 ("Although the Commission has both the authority and expertise generally to adopt new policies when faced with new developments in the industry. . . it does not have the power to adopt a policy that directly conflicts with its governing statute.")

The *Maislin* case was based on the Court's perceived abdication by the ICC of its responsibilities under the Interstate Commerce Act. However, the factual and regulatory circumstances that formed the basis for the ICC's actions are quite different from those existing in the communications industry. Thus, the Court's holding does not necessary translate to invalidate the Commission's policies.

Specifically, the transport industry consists of thousands of small, medium and large-sized business providing service on a local, regional or national basis, with no individual company holding a substantial portion of the market. The ICC thus did not have a regulated dominant carrier to serve as a check against unreasonable rates and practices by other carriers. The absence of a regulated dominant carrier to provide a benchmark for consumers and regulators made it impossible for the ICC — without enforced tariffs — to fulfill its statutory duties to ensure that rates are just and reasonable. Therefore, the ICC was found by the Supreme Court to have abdicated its statutory responsibilities by essentially deregulating all motor carriers.

The telecommunications industry, in contrast, has a single dominant carrier which serves approximately two-thirds of the total market. The presence of this dominant carrier, and the Commission's findings that the market power of this company make impossible any unjust or discriminatory pricing behavior by competitors,[54] clearly distinguishes the telecommunications industry from the transportation market and the FCC's forbearance policy from the ICC doctrine nullified in *Maislin*. Indeed, use of a regulatory approach wherein the FCC directly regulates a single competitor with a large market share and only

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54 See First Report and Order at 6.

indirectly regulates other carriers through their need to remain competitive is not a new or novel concept.

Nearly 40 years ago the Commission found that employing a rate policy focusing on a single carrier would serve to regulate the international record carrier marketplace as a whole.[55] This regulatory theory, also known as the "bellwether" or "criterion carrier" approach, was first used by the Commission in 1952[56] to regulate telecommunications common carriers. At that time, international record carriers were in a competitive market, while AT&T and Western Union enjoyed domestic monopolies over long distance telephone and telegraph services respectively.

As used by the Commission in the past, the bellwether approach relied on a Commission finding identifying one carrier as a market leader[57] and regulating the rates of that carrier. Thereafter, all competing carriers were price constrained by the regulated company, thus ensuring the public a competitive marketplace at just and reasonable prices. Indeed, smaller carriers would be motivated to improve efficiency and reduce prices in an effort to gain a larger market share.[58] In essence, the bellwether theory requires a Commission

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55 Western Union Tel. Co., 25 F.C.C. 532 (1958).

56 See Charges for and in Connection with Markin Telegraph Services, FCC 52D-35 (Sept. 10, 1952).

57 Western Union Tel. Co., 25 F.C.C. at 580.

58 The Commission recognized this basic pricing theory again in its Competitive Carrier rulemaking.

> [C]arriers engaging only in the provision of competitive services do not normally possess market power, i.e., they do not have the ability to establish and maintain rates that are significantly above or below the marketplace price. If such a carrier attempts to sell at above the market price, it is likely to lose customers to its competitors. If a competitor's costs remain above the market price, which over the long run should be cost related, then that competitor will likely leave the market as an inefficient provider. . . . Moreover, the competitive carrier has no incentive over the long run to price below its costs since it has (1) little expectation of achieving monopoly status and thus recouping its losses through future monopoly rents and (2) no monopoly service from which to finance the necessary subsidization.

determination of which carrier is dominant (i.e., the price leader with market power), and full Title II regulation of that carrier.

It was precisely this type of long-standing regulatory logic that was employed by the Commission when it adopted the *Competitive Carrier* decisions. In initiating that proceeding, the Commission recognized that regulatory efforts to assure just and reasonable rates in a competitive marketplace by "applying the rules and procedures we established to regulate the rates charged by carriers operating in a monopoly market seem to have resulted in unnecessary regulatory burdens and retarded some of the cost and service benefits."[59] Thus, the Commission has recognized for decades that full Title II regulation of only the dominant carrier can ensure that the agency is able to enforce all statutory requirements applicable to common carriers.

This regulatory approach is consistent with *Maislin*. In the *Maislin* case, the Supreme Court's analysis was not limited to a literal reading of one section of the Interstate Commerce Act without regard to practicalities; rather, the Court concluded that the ICC had effectively abdicated its responsibility to oversee the motor carrier industry by allowing *all* carriers to provide service on an off-tariff basis. The agency, and consumers, thus had no frame of reference by which to judge the reasonableness of prices and terms of service. With no regulated dominant carrier to discipline the marketplace, and no enforced dominant carrier tariffs to permit price comparisons, it became impossible to judge the lawfulness of any motor carrier's prices.

When read in this light, it becomes clear that the FCC's forbearance policy does not conflict with the Court's holding in *Maislin*. Because the Commission

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NPRM at 316-17.

59 *Id.* at 309.

continues to regulate AT&T, the "dominant" or "bellwether" carrier, it is fulfilling its statutory duties in an effective and long accepted way. As the Commission has correctly recognized, regulation of the carrier with market power serves to restrain the behavior of its non-dominant competitors. AT&T's tariffed rates provide the agency and consumers with a benchmark by which the prices of others can be gauged. And because AT&T retains market power, competitors are unable to price above AT&T or to discriminate unduly. The Commission's forbearance policy thus ensures that all carriers provide service at just and reasonable rates and in accordance with all public interest objectives without pointlessly burdening the Commission with unnecessary tariffs.

In essence, AT&T's allegation that certain Commission rules are unlawful in light of *Maislin* is clearly erroneous. The Commission's forbearance policies do not represent an abdication of its statutory responsibilities. Rather, they represent a well-balanced attempt to regulate the telecommunications industry by overseeing the rates of only the dominant carrier, which, because of marketplace realities, thereby ensures that non-dominant carriers also charge rates which are no more than just and reasonable. Nothing in *Maislin* requires the Commission to abandon its pro-competitive actions or its forbearance policy.

III. THE COMMISSION IS EMPOWERED TO ESTABLISH CLASSES OF CARRIERS AND TO APPLY VARYING DEGREES OF REGULATION

Notwithstanding the foregoing demonstration that the Commission's forbearance policy is both legally sustainable and entirely appropriate, should the Commission decide not to continue with forbearance regulation for non-dominant carriers, it may still apply varying types of regulatory requirements on different classes of common carriers.